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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | |
|---------------------------|--|
| Proceeding | 91218363 |
| Party | Plaintiff New Wave Innovations, Inc. |
| Correspondence Address | JOHN H FARO FARO & ASSOCIATES 1395 BRICKELL AVENUE SUITE 800 MIAMI, FL 33131 UNITED STATES JOHNF75712@AOL.COM |
| Submission | Motion for Summary Judgment |
| Filer's Name | John H. Faro |
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| Signature | /John H. Faro/ |
| Date | 12/10/2015 |
| Attachments | JudgmenOnRecord2.pdf(3246870 bytes) |

IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

NEW WAVE INNOVATIONS, INC.
Opposer

vs.

MR. FOAMER, INC. (A F
LORIDA CORPORATION)
Applicant

OPPOSITION NO.
91/218,363

MOTION FOR ENTRY OF JUDGMENT ON THE RECORD

New Wave Innovation, Inc. (NWI) herein notices and files its *Motion for Judgment On The Record* before the TTAB.

SUMMARY OF NWI MOTION

- A. **The Parties:** The Applicant for registration of the MR FOAMER mark is Mr. Foamer, Inc. (also “MFI”); and, the Opposer is New Wave Innovations Inc. (“NWI”)
- B. **The Record Before the TTAB**
1. The Opposer, NWI, has asserted in its *Amended Opposition*, filed on November 12, 2015, that:
 - a. NWI was the first to adopt and use the MR FOAMER mark for the distribution and sale of commercial car wash products on the internet. There is a likelihood of confusion in the marketplace, *Amended Opposition*, Count I, @ pages 1-3; and,
 - b. The Mr. Foamer, Inc. (MFI) is fraudulent, *Amended Opposition*, Count II @ pages 3-4;

2. MFI moved to dismiss both Counts I & II of the NWI Opposition, and the TTAB has dismissed Count II of the NWI *Amended Opposition*.
3. TTAB has held that Count I of the NWI *Amended Opposition* is sufficient to set forth a claim for Opposition based upon the following:
 - a. NWI has standing to oppose the application for registration of the MFI application to register the MR FOAMER mark;
 - b. NWI has alleged sufficient facts, which, if proven, establish a date prior to November 2, 2013 (the date of the filing of the MFI trademark application);
4. The Parties have filed a *Joint Stipulation Regarding Admission of Evidence*, (Exhibit "1"), which includes, and incorporates by reference the entire litigation file in *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation")
5. The *Joint Stipulation* includes, without limitation, the following:
 - a. an acknowledgement of the existence of the litigation in the United States Federal District Court in the Southern District of Florida, *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation");
 - b. NWI sued MFI for infringement of the MR FOAMER trademark in the United States Federal District Court in the Southern District of Florida, *Amended Complaint (First) @ page 13. Docket Entry No. 13.1.*, *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation") – Exhibit "2" (Pages 1 & 13)

- c. MFI has filed an Answer To Amended Complaint, including a number of affirmative defenses, including a **Fifth Defense**, in which it denied any use of the MR FOAMER trademark, *Answer to Amended Complaint, Docket Entry No. 43 @ page 14, New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation") **Exhibit "3" (Pages 1 & 14)**
- d. The attorneys, Isabel Jong and Stephen Greenberg, who represented MFI in the Lanham Act litigation, are the same attorneys also filed and/or approved the filing of the MFI application to register the MR FOAMER mark, which is in issue in this Opposition;
- e. this *Joint Stipulation, (Exhibit "1")*, includes the "**entire record**" before the District Court, which has been "*submitted into evidence and used as evidence by the Parties in this Opposition*",
- f. MFI has explicitly acknowledged on **October 21, 2013**, in an affidavit file by the MFI president that:

"That Mr. Foamer does not use a trademark containing the terms "MR. FOAMER" in connection with sale of any product". *Affidavit of James McClimond, Docket Entry No. 50-1, New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation"), (emphasis added) **Exhibit "4" (Pages 1-8)**
- g. Excerpts from the Transcript of the **October 29, 2013**, evidentiary hearing

on the NWI Motion for Preliminary Injunction include the following sworn testimony.

- i. MFI (through its president, James (Jim) McClimond) testified under oath that his company, Mr. Foamer, Inc. (Applicant), “...*never sold a product called Mr. Foamer*”, ***Direct Testimony by MFI President, James McClimond, Docket Entry No. 61, Hearing Transcript @ page 184, New Wave Innovations, Inc. v. James (Jim) McClimond, Case No. 2013-CV-22541. (herein "Lanham Act Litigation"), (emphasis added), Exhibit “5”***
- ii. NWI (through its president, Michael Ross) testified under oath, that the MR FOAMER mark was used by NWI on Christmas Card promotion/greeting forward to its customers, (including MFI); and, this **Christmas Card** included a discount “**coupon**” (***Discount Gift Certificate***) for the NWI products, **Cross-Examination of NWI President, Michael Ross, Docket Entry No. 61, Hearing Transcript @ page 80, New Wave Innovations, Inc. v. James (Jim) McClimond, Case No. 2013-CV-22541. (herein "Lanham Act Litigation"), (emphasis added) Exhibit “6”**
- iii. NWI (through its president, Michael Ross) testified under oath, that the date of first use on the MR FOAMER mark on **Christmas Card** was in **December 2011**, **Examination by Court of NWI President, Michael Ross Docket Entry No. 61, Hearing Transcript @ page 70, line 22 to page 71, line 4, New Wave Innovations, Inc. v. James**

(Jim) McClimond, Case No. 2013-CV-22541. (herein "Lanham Act Litigation"), (emphasis added) **Exhibit "7"**

- h. The NWI trademark application SN 86304665 for registration of the MR FOAMER trademark, was examined and approved for publication on March 19, 2015, and subsequently withdrawn from publication after the Trademark Examiner discovered potential conflict of the with earlier filed MWI trademark application SN 86304665 MFI application for registration of the MR FOAMER.
- i. The NWI trademark application SN 86304665 for registration of the MR FOAMER trademark, claims a date of first use of no later than **December 15, 2011**
- j. The "substitute specimen" filed in NWI trademark application SN 86304665, includes the "email" cover page, a two panel "Christmas card" which depicts the MR FOAMER on the front panel, the Christmas greeting from New Wave Innovations on the inside or back panel, and "Gift Certificate" (coupon) to "Our Valued Customer" for purchase on NWI products, e.g. "receive \$100 off on any order of \$500 or more"; "free elephant ears on any order of \$500 or more" and "free foam sticks on any order of \$500 or more"

MEMORANDUM IN SUPPORT OF MOTION

The MFI Application for Registration Of The MR FOAMER Mark Conflicts With The Superior Rights Of NWI In The MR FOAMER Mark – The Record before the TTAB establishes the NWI prior adoption and use of the MR FOAMER mark in December 2011, in a solicitation for

the distribution and sale of commercial car wash products on the internet. This solicitation was in the form of a Christmas card, having a cartoon like figure named Mr. Foamer with a Santa cap, on one panel, and a Christmas greeting from New Wave Innovations, on a second panel. A “Gift Certificate” was included with the card, for discounts/promotional prices on NWI products. This Christmas card and “Gift Certificate” was sent to all of the NWI customers and distributors in the NWI data base. Insofar as MFI was a customer of NWI in December 2011, this Christmas card and “Gift Certificate” was also sent to MFI, *NWI Invoice No. 136 to MFI, dated November 11, 2011, Exhibit “8”*

It is undisputed that MFI distributes and sells commercial car wash products to the same customers through the same trade channels, as NWI. The Federal Court litigation between the parties is based upon the sale of commercial car wash products which share many of the same functional features and distinctive designs. During this Federal Court litigation, MFI has steadfastly maintained in its pleadings, affidavits and sworn testimony, that it has not used the MR FOAMER as a trademark, and, that the only use of MR FOAMER is in the corporate registration for the name of its company. Clearly, the MFI registration of the MR FOAMER mark, for commercial car wash products, shall further compound the likelihood of confusion, as to the NWI and MFI competing products, the source of such products and suggestion of affiliation of the parties.

On June 12, 2014, in anticipation of provocation of this Opposition, NWI filed its own application for the registration of the MR FOAMER mark, NWI MR FOAMER trademark application, SN 86304665. On March 19, 2015, the examination of the NWI MR FOAMER trademark application was complete, and the NWI MR FOAMER application approved for publication. Because of the conflict with the earlier filed MFI application for the same MR

FOAMER (for essentially the same services), the NWI application was withdrawn from publication.

As set forth hereinafter, MFI has taken diametrically opposition positions relative to its adoption and use of the terms MR FOAMER, in the Federal Court, and as it has taken in its trademark application, and now before the TTAB.

The Doctrine of Judicial Estoppel Requires The Imposition of Appropriate Sanctions To Protect Against Applicant Playing Fast And Loose With The Judicial Process— The MFI trademark application claims a date of first use by MFI of the MR FOAMER mark as early as August 2012, for the promotion of its goods and service. This date is disputed by NWI. Moreover, the objective evidence in Record before the TTAB (pleadings, affidavits and sworn testimony in the Federal Court litigation) is inconsistent with the MFI allege adoption or use of the MR FOAMER mark by MFI, as of August 2012, or for that matter at any time prior to the filing of its trademark application on November 2, 2012. More specifically,

- a. On **September 27, 2013**, MFI filed an *Answer to Amended Complaint* in the Federal Court litigation, in which explicitly acknowledged that it did not use any of the trademarks which were alleged to have been infringed in the NWI Amended Complaint, including the MR FOAMER trademark

Fifth Defense

Failure to State a Claim Against Mr. Foamer for Trademark Infringement, Trade Dress Infringement and Unfair Competition

Contrary to New Wave's allegations, Mr. Foamer does not use in commerce the alleged trademarks or trade dress of New Wave in connection with the sale of its products. Accordingly, New Wave cannot demonstrate any trademark infringement, trade dress infringement or unfair competition on the part of Mr. Foamer. (emphasis added), MDI **Answer to Amended Complaint, Docket Entry No. 42**, , *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein

"Lanham Act Litigation"), (emphasis added);

- b. **October 21, 2013** – The *Affidavit of James McClimond* stated “That Mr. Foamer does not use a trademark containing the terms “MR. FOAMER” in connection with sale of any product”. *Docket Entry No. 50-1, New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation"), (emphasis added)
- c. **October 29, 2013** - *James (Jim) McClimond sworn testimony* that his company, Mr. Foamer, Inc. (Applicant), “...*never sold a product called Mr. Foamer*”, Direct Testimony by James McClimond, **Docket Entry No. 61, Hearing Transcript @ page 184**, *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein "Lanham Act Litigation"), (emphasis added);

Three (3) days after James (Jim) McClimond testified under oath that MFI never sold a product associated with the MR. FOAMER mark, his attorneys filed the MFI application to register the MR FOAMER mark, **(on November 2, 2013)**, which is currently involved in this opposition. Notwithstanding, the TTAB Order (April 3, 2015) granting of the MFI *Motion to Dismiss the NWI Opposition Court II* for fraud, the TTAB is not free to ignore manifest inconsistencies in the MFI legal defensive position asserted in the Federal District Court, when charged with trademark infringement, and the MFI diametrically opposite offensive position in its application for registration of the MR FOAMER trademark, advocated before the Trademark Office, (the date of alleged adoption and use of the MR FOAMER mark), *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355, 358, 22 USPQ2d 1055 (C.A. Fed. 1992),

The doctrine of judicial estoppel is the general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895). The First Circuit recognizes the doctrine of judicial estoppel. *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir.1987). It employs the doctrine when a litigant is “playing fast and loose with the courts,” and when “intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.” *Id.* (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir.1953)). In order to be subject to judicial estoppel, a party, having obtained a litigation benefit, must have attempted to invoke the authority of one tribunal to override a bargain made with

another. United States v. Levasseur, 846 F.2d 786, 793 (1st Cir.1988) (further defining doctrine of judicial estoppel adopted in Patriot Cinemas). (emphasis added)

The doctrine of judicial estoppel is not unique to patent law, *SpeedTrack, Inc. v. Endeca Techs., Inc.* Decided: April 16, 2013 (Fed. Cir. 2013).

Courts invoke judicial estoppel for “general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,” and to “protect against a litigant playing fast and loose with the courts.” *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

Even if the MFI “inconsistencies” (“intentional self-contradiction”), relative to its date of adoption and use of the MR FOAMER mark, do not amount to “fraud”, (within the confines of the legal precedent for striking a trademark application), the MFI palpable deception and dishonesty practiced in the Federal District Court, and before the Patent & Trademark Office, requires an appropriate response.

Accordingly, NWI renews its request that the TTAB preserve the “orderly administration of justice and regard for the dignity of judicial proceedings”, and exercise its inherent administrative powers, by striking the MFI trademark application for which registration is sought, and/or alternatively, strike the MFI Answer to this Opposition and enter judgment for NWI.

Respectfully,

/John H. Faro/
John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiff

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EXHIBIT "1"

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Opposition No. 91218363

NEW WAVE INNOVATIONS INC.
Opposer

vs.

MR. FOAMER, INC.
Applicant

JOINT STIPULATION REGARDING ADMISSION OF EVIDENCE

New Wave Innovations, Inc. and Mr. Foamer, Inc. (collectively, the “Parties”) hereby submit their Joint Stipulation Regarding the Admission of Evidence in Opposition No. 91218363 (the “Opposition”).

The Parties hereby stipulate and agree that the entire record in the case captioned *New Wave Innovations, Inc. v. McClimond et al.*, Case No. 1:13-cv-22541, District Court for the Southern District of Florida (the “Federal Case”) be submitted into evidence and used as evidence by the Parties in this Opposition.

The Parties also hereby stipulate and agree that the entire record in the case captioned *New Wave Innovations, Inc. v. McClimond et al.*, Case No. 14-11466, United States Court of Appeals for the Eleventh Circuit (the “Appeal”) be submitted into evidence and used as evidence by the Parties in this Opposition.

The Parties acknowledge that they were parties to the Federal Case and Appeal, which records comprise evidence related to the MR. FOAMER mark forming the basis of this Opposition.

Date: 10/16/2015

/s/ John H. Faro
John H. Faro
Attorney for Opposer

Date: 09/23/2015

/s/ Isabelle Jung
Isabelle Jung
Attorney for Applicant

ESTTA Tracking number: **ESTTA702663**

Filing date: **10/16/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|---------------------------|--|
| Proceeding | 91218363 |
| Party | Defendant Mr. Foamer, Inc. |
| Correspondence Address | ISABELLE JUNG CAREY RODRIGUEZ GREENBERG & O'KEEFE LLP 7900 GLADES RD STE 520 BOCA RATON, FL 33434-4105 UNITED STATES pto@crgolaw.com, ijung@crgolaw.com |
| Submission | Other Motions/Papers |
| Filer's Name | Isabelle Jung |
| Filer's e-mail | ijung@crgolaw.com |
| Signature | /Isabelle Jung/ |
| Date | 10/16/2015 |
| Attachments | Stipulation.pdf(92606 bytes) |

EXHIBIT "2"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-22541-COOKE/TURNOFF

| | |
|--|---|
| NEW WAVE INNOVATIONS, INC. |) |
| |) |
| Plaintiff |) |
| vs. |) |
| |) |
| JAMES (JIM) MCCLIMOND (AN INDIVIDUAL), |) |
| MR. FOAMER, INC. (A FLORIDA CORPORATION) & |) |
| CAR WASH EXPERTS, INC. (A FLORIDA |) |
| CORPORATION) |) |
| |) |
| Defendants |) |
| _____ | / |

**AMENDED COMPLAINT
(First)**

The Plaintiff, New Wave Innovations, Inc. (hereinafter also "NEW WAVE"), by counsel, alleges for its Complaint, upon knowledge, with respect to its own acts, and upon information and belief as to all other matters, as follows:

Nature of the Action

I. New Wave Innovations, Inc., a California Corporation, based in Lodi, California, brings this action against the Defendants, James (Jim) McClimond, Car Wash Experts, Inc., and Mr. Foamer, Inc., (herein also collectively "MCCLIMOND") for

- a. False Designation Of Origin under the Lanham Act, 15 U.S.C. § 1125(a);
- b. Trade Dress Infringement under the Lanham Act, 15 U.S.C. § 1125(a);
- c. Breach of Confidential Business Relationship, State Law;
- d. Trademark Infringement, State Law
- e. Florida Unfair and Deceptive Trade Practices Act, §§ 501.201, et seq., Fla. Stat.

53. The MCCLIMOND use and disclosure of NEW WAVE proprietary information, without regard to his obligations to NEW WAVE, as set forth in Paragraph 52, breached his obligation to NEW WAVE under the agreement, in fact, to maintain such proprietary information in confidence and refrain from use thereof other than as authorized.

54. The MCCLIMOND use and disclosure of NEW WAVE proprietary information, without regard to his obligations to NEW WAVE, as set forth in Paragraph 52, has been deliberate and calculated to damage NEW WAVE in its business and in the perception of the NEW WAVE distributors and customers.

55. The MCCLIMOND use and disclosure of NEW WAVE proprietary information, without regard to his obligations to NEW WAVE, as set forth in Paragraph 52, has caused and shall continue to cause, irreparable harm to NEW WAVE, which cannot be adequately compensated by monetary damages.

Count IV
(Trademark Infringement – Florida Common Law)

56. The allegations in Paragraphs 7 through 26, inclusive, are incorporated herein by reference.

57. MCCLIMOND has infringed, and continues to infringe, on NEW WAVE's exclusive rights to the NEW WAVE MARKS and distinctive trade dress, by using, in commerce, the NEW WAVE MARKS, or a colorable imitation of the NEW WAVE MARKS, specifically, the MCCLIMOND marks "*Mr. Foamer Generator*", "*Elephant Ears Foam Applicator*", and distinctive trade dress, in connection with the sale, offering for sale, distribution, or advertising of its product and/or by applying the NEW WAVE MARKS, or a colorable imitation of the NEW WAVE MARKS, to printed materials, products and advertising materials, including but not limited to the "*Twist 'n Kleen*" foam generator and the "*Elephant Ears*" foam applicator, sold by MCCLIMOND.

EXHIBIT "3"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case No. 13-CV-22541-COOKE/TURNOFF

NEW WAVE INNOVATIONS, INC.

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,
INC., and CAR WASH EXPERTS INC.

Defendants.

ANSWER TO AMENDED COMPLAINT

Defendants, James McClimond ("**McClimond**"), Mr. Foamer Inc. ("**Mr. Foamer**") and Car Wash Experts Inc. ("**Car Wash Experts**") (each a "**Defendant**" and collectively "**Defendants**"), submit this Answer to the Amended Complaint filed by Plaintiff, New Wave Innovations, Inc. ("**New Wave**" or "**Plaintiff**"), and allege as follows:

Nature of the Action

1. Paragraph 1 of the Amended Complaint is admitted for jurisdictional purposes only. The remaining allegations contained in Paragraph 1 are denied.

Jurisdiction and Venue

2. Defendants admit that this Court has subject matter jurisdiction. The remaining allegations contained in Paragraph 2 are denied.

3. Defendants admit the allegations contained in Paragraph 3 of the Amended Complaint for jurisdictional purposes only. The remaining allegations contained in Paragraph 3 are denied.

Fourth Defense

No Damages Suffered by New Wave as a Result of McClimond's Actions

Because McClimond does not individually sell any product or individually own or use in commerce any intellectual property right, New Wave did not suffer any damages as a result of McClimond's individual actions. Accordingly, New Wave is precluded from seeking any relief for trademark infringement, trade dress infringement and unfair competition against McClimond, individually.

Fifth Defense

Failure to State a Claim Against Mr. Foamer for Trademark Infringement, Trade Dress Infringement and Unfair Competition

Contrary to New Wave's allegations, Mr. Foamer does not use in commerce the alleged trademarks or trade dress of New Wave in connection with the sale of its products. Accordingly, New Wave cannot demonstrate any trademark infringement, trade dress infringement or unfair competition on the part of Mr. Foamer.

Sixth Defense

No Damages Suffered by New Wave as a Result of Mr. Foamer's Actions

Mr. Foamer does not use in commerce the alleged trademarks of New Wave in connection with the products it sells. Moreover, the trade dress of New Wave's Turbo Foam Generator and/or the trade dress of New Wave's Elephant Ears Foam Applicator are not similar to the trade dress of the products sold by Mr. Foamer. Therefore, New Wave has not and cannot demonstrate a valid legal claim for trademark infringement, trade dress infringement or unfair competition against Mr. Foamer, and New Wave is precluded from seeking relief against Mr. Foamer in this action.

Seventh Defense

Inability to State a Claim for Breach of Confidential Business Relationship Against Mr. Foamer

EXHIBIT "4"

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**Case No. 13-cv-22541
TURNOFF, 07/22/2013**

NEW WAVE INNOVATIONS, INC.

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,
INC., and CAR WASH EXPERTS INC.

Defendants.

**AFFIDAVIT OF JAMES MCCLIMOND IN SUPPORT OF DEFENDANTS'
OPPOSITION (D.E. 33) TO PLAINTIFF'S MOTION FOR A PRELIMINARY
INJUNCTION (D.E. 17)**

STATE OF FLORIDA

County of _____ ss:

James McClimond, being duly sworn, deposes and says:

1. I am the president of Car Wash Experts, Inc. ("Car Wash Experts") and the president of Mr. Foamer, Inc. ("Mr. Foamer").

Mr. Foamer and Car Wash Experts

2. Mr. Foamer and Car Wash Experts are both in existence.

3. Mr. Foamer is a separate company from Car Wash Experts and Car Wash Experts is not a predecessor in-interest to Mr. Foamer.

4. Mr. Foamer sells car wash foam generators also known as foamers, car wash foam applicators and other car wash related products manufactured by Mr. Foamer.

5. Car Wash Experts used to sell car wash related products manufactured by third parties.

6. Car Wash Experts stopped selling products sometime around June 2013.

7. Car Wash Experts currently does not sell any products.

Trademark Use

8. Car Wash Experts does not use a trademark containing the terms "TURBO FOAM" in connection with the sale of any product or service.

9. Mr. Foamer does not use a trademark containing the terms "TURBO FOAM" in connection with the sale of any product or service.

10. Car Wash Experts does not use a trademark containing the terms "ELEPHANT EARS" in connection with the sale of any product or service.

11. Mr. Foamer does not use a trademark containing the terms "ELEPHANT EARS" in connection with the sale of any product or service.

12. Car Wash Experts does not use a trademark containing the terms "MR. FOAMER" in connection with the sale of any product or service.

13. Mr. Foamer does not use a trademark containing the terms "MR. FOAMER" in connection with the sale of any product.

14. New Wave Innovations, Inc. ("New Wave") does not sell any product or service under the trademark "MR. FOAMER."

15. I have expended approximately over \$30,000.00 in branding my company as "Mr. Foamer, Inc." and any requirement that I rebrand my company will likely cost as much if not more.

Representations Made by Myself, Mr. Foamer or Car Wash Experts

16. Mr. Foamer has never alleged on its website, www.mrfoamer.com, that Mr. Foamer provided a comparable car wash foamer to the New Wave Turbo Foam Generator.

17. Mr. Foamer has never told customers that the Mr. Foamer Twist N' Kleen was the same product as the New Wave Turbo Foam Generator.

18. Mr. Foamer has never represented that Mr. Foamer was the East coast address for New Wave.

19. I have never held myself out as being affiliated with New Wave.

20. Car Wash Experts has never held itself out as a company being affiliated with New Wave.

21. Mr. Foamer has never held itself out as a company being affiliated with New Wave.

22. Mr. Foamer has never alleged on its website, www.mrfoamer.com, that Mr. Foamer is a company owned by New Wave or a company affiliated with New Wave.

23. I have never claimed or stated to anyone that I was the inventor of the New Wave Turbo Foam Generator.

24. The posting on Mr. Foamer's Facebook account webpage as shown in Exhibit A to this affidavit, namely "Jim you said you were the inventor," was made by a person named "Dave Wright." (See attached Exhibit "A").

25. I do not know and never met a person named Dave Wright.

26. I have never claimed or stated to anyone that New Wave appropriated the New Wave Turbo Foam Generator from me.

27. Car Wash Experts has not purchased products sold by New Wave for the purpose of promoting its own products.

28. Mr. Foamer has not purchased products sold by New Wave for the purpose of promoting its own products.

Confidential Information

29. I never received any confidential or proprietary information about any product sold by New Wave from New Wave.

30. Car Wash Experts never received any confidential or proprietary information about any product sold by New Wave from New Wave.

31. Mr. Foamer never received any confidential or proprietary information about any product sold by New Wave from New Wave.

32. Aside from invoices, the only documents (the "Documents") I have ever received from New Wave were emailed to me by New Wave in two separate emails on or about November 17, 2011, copies of which are attached as Exhibit B to this affidavit (Exhibit "B").

33. The Documents consist of six (6) brochures/advertisement pertaining to the products sold by New Wave, a blank document entitled "customer information sheet," a blank document entitled "account agreement form," a blank document entitled "order form," a blank form entitled "authorized users," a form entitled "order instructions," and a price list. A copy of the Documents is attached as Exhibit C to this affidavit (Exhibit "C").

The New Wave Christmas Card

34. I never received an original or copy of the Christmas card sent by New Wave as seen on Exhibit D to this Affidavit. (See attached Exhibit "D," New Wave Christmas card.)

35. The first time I saw a copy of the Christmas card sent by New Wave as seen on Exhibit D was when I was served with a copy of the Motion for a Preliminary Injunction (D.E. 17) filed by New Wave in this action.

36. I did not adopt "Mr. Foamer, Inc." as a company name in an effort to create an association with New Wave.

New Wave Products and Consumer Recognition

37. Third parties do not associate the design of the New Wave Turbo Foam Generator with New Wave.

38. Third parties do not know that New Wave is the source of the Turbo Foam Generator.

39. Third parties do not associate the design of the New Wave Elephant Ears Applicator with New Wave.

40. Third parties do not know that New Wave is the source of the Elephant Ears Applicator.

The New Wave Foamer Designs

41. The use of the color blue in advertising and promotional materials in the car wash industry is extremely common as the color blue is generally associated with the color of water.

42. The design and shape of New Wave's Turbo Foam Generator is not unique to foamers and is actually common in the car wash industry as shown in the attached photographs evidencing that competitors of New Wave use a similar design and shape for competitive foamers (Exhibit E).

43. New Wave's Turbo Foam Generator is a variation of a commonly seen design for foamers used in the car wash industry.

44. New Wave's Elephant Ears Applicator is a variation of a commonly seen design for foam applicators used in the car wash industry.

45. The configuration of the New Wave's Turbo Foam Generator are functional in nature: (1) the design of the foam insert of the Turbo Foam Generator allows easy disassembly and removal of the insert from the device; (2) the number of the inlet ports on the housing of the New Wave's Turbo Foam Generator is necessary for the device to perform its intended use—one inlet port for the entry of the air/water, the other inlet port for the entry of the chemicals in the generator; (3) the placement of the inlets on the upper part of the device is required in order to deliver the air/water and chemicals from the top portion and allow them to flow downwards and throughout the device until they reach the bottom portion—placement of these inlets anywhere else on the foamer would not allow the foamer to work properly; (5) the alternating elements on the insert of the New Wave's Turbo Foam Generator allow the foam to be created in a more consistent manner; (6) the transparent housing of New Wave's Turbo Foam Generator determines when the device is dirty and needs to be cleaned; and (7) the upper and lower couplings and their location on New Wave's Turbo Foam Generator allow the mounting of an outlet to the device.

46. I reviewed New Wave's Turbo Foam Generator and concluded that it did not incorporate a turbine.

47. The configuration of the New Wave's Elephant Ears Applicator is functional in nature: (1) the design of the foam insert of the Elephant Ears Applicator allows easy disassembly and removal of the insert from the device; (2) the number of the inlet ports on the housing of the New Wave's Elephant Ears Applicator is necessary for the foam applicator to perform its intended use--one inlet port is for the entry of the air/water, the other inlet port is for the entry of the chemicals in the generator; (3) the placement of the inlets on the upper part of the device is necessary in order to deliver the air/water and chemicals from the top portion and allow them to flow downwards and throughout the device until they reach the bottom portion—placement of these inlets anywhere else on the applicator would not allow the applicator to work properly; (4) the alternating elements on the insert of the New Wave's Elephant Ears Applicator allow the foam to be created in a more consistent manner; (5) the transparent housing of New Wave's Elephant Ears Applicator determines when the device is dirty and needs to be cleaned; (6) the upper and lower couplings and their location on New Wave's Elephant Ears Applicator allow the mounting of an outlet to the device; and (7) the curving of the tube of New Wave's Elephant Ears Applicator allows foam to be oriented in the proper direction.

Meaning of Car Wash Industrial Terms

48. The term "TURBO" refers to a device using or incorporating a turbine.

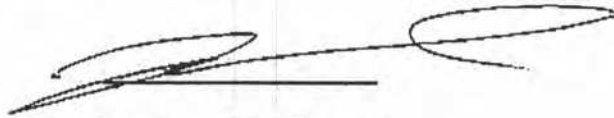
49. The term "FOAM" is often used in the car wash industry to refer to a frothy mass of bubbles used to wash cars in the car wash industry.

50. The term "GENERATOR" is often used in the car wash industry to refer to a device which generates foam.

51. The term "APPLICATOR" is often used in the car wash industry to refer to a device to apply foam to cars in the car wash industry.

52. The term "FOAMER" is often used in the car wash industry to refer to a device which generates foam to be applied to cars in the car wash industry.

53. The terms "ELEPHANT EARS" are used by a company called Sonny's Enterprises Inc., one of the most famous companies in the car wash industry. Sonny's Enterprises Inc. uses the terms "ELEPHANT EARS" in connection with the sale of its drying device in the car wash industry.

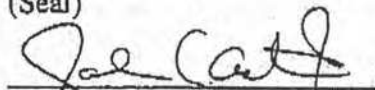


By: James McClimond

GEORGIA
STATE OF ~~FLORIDA~~
COUNTY OF COB

Subscribed and sworn to (or affirmed) before me on this 21 day of Oct, 2013
by JAMES MCCLIMOND, personally known to me (or proved to me on the basis of
satisfactory evidence) to be the person who appeared before me.

(Seal)


Signature

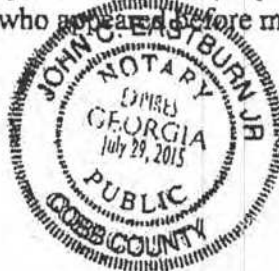


EXHIBIT "5"

1 MR. PALMER: Your Honor, I think they're currently
2 exhibits for the Court. I don't know if you want us to leave
3 them behind.

4 THE COURT: No. No. No.

5 THE WITNESS: You can have mine. It's okay.

6 THE COURT: No. It's 99.95 and 139.99. So I don't
7 want to -- we have to do gift reporting.

8 Is there a 500-dollar limit, Maria? Well, they're
9 separated. Do any of you guys do that kind of law?

10 MR. PALMER: What kind is that?

11 THE COURT: If it's over a certain amount from a
12 foreign government.

✓ 13 MR. PALMER: I'm at a loss, your Honor.

14 THE COURT: Well, California is a separate republic.
15 In Stewart, they have normal, nice people up there, too.
16 Anything north of Fort Pierce, we're okay. People are normal
17 and nice and polite and whatever. In California, all you do is
18 pay income tax.

19 BY MR. PALMER:

✓ 20 Q. Have you ever sold a product called a Mr. Foamer?

21 A. No.

22 Q. It's just the name of your company?

23 A. That is correct.

24 THE COURT: Why did you pick that name?

25 THE WITNESS: Actually, it's -- the gentleman who

EXHIBIT "6"

✓ 1 Q. Now, Mr. Foamer, if I may -- Exhibit No. 1 is the ad for
2 Mr. Foamer? That's ad where -- I'm sorry.

3 This is the Christmas card that you used. Correct?

4 A. Yes.

5 Q. And there's no offer to sell anything in this, is there?

✓ 6 A. Yeah. On the inside, actually, there was. We actually did
7 a coupon.

8 Q. There's no offer to sell in this exhibit, is there, sir?

9 A. No.

10 Q. There's no price in this exhibit, is there?

11 A. Anybody who got that had already purchased from us. So
12 they were aware of who it's coming from and our products and
13 what we sell.

14 Q. Okay. So they were -- they would be aware, for instance,
15 that you used the name New Wave Innovations --

16 A. Yes.

17 Q. -- on the Christmas card?

18 A. Yes.

19 Q. And the Mr. Foamer is not the product, is it, sir? It's
20 the cartoon character that's around the product. Correct?

21 A. The Mr. Foamer would be the actual name -- the fictional
22 name of that character being represented.

23 Q. Thank you.

24 So the fictional character is not a product, is it?

25 A. It is a representation of our product.

EXHIBIT “7”

1 They knew that that was not ours.

2 Q. I see.

3 And, in fact, Motor City had contacted you at one time or
4 another, inquiring about a license. Is that true?

5 A. We had e-mail and verbal communication with the CEO of
6 Motor City, and he said "Finalize your patent."

7 THE COURT: When did you start manufacturing -- you
8 know, making available for distribution this new product?

9 THE WITNESS: We made them available for distribution
10 at the ICA show in Las Vegas, Nevada, in 2011, May 22nd.

11 BY MR. FARO:

12 Q. Will you tell him what those initials stand for, please.

13 THE COURT: I'm sorry. I don't -- May, 2011?

14 THE WITNESS: Yes.

15 THE COURT: And you started selling them as of May,
16 2011?

17 THE WITNESS: Yes.

18 THE COURT: Under what name?

19 THE WITNESS: New Wave Innovations, Inc.

20 MR. FARO: And Turbo Foam Generators.

21 THE WITNESS: Yeah.

22 THE COURT: And the name Mr. Foamer: Why did you
23 decide to send out a Christmas card with Mr. Foamer on it a
24 year and a half later?

25 THE WITNESS: It was that year, 2011.

1 MR. FARO: Mr. Foamer was 2011 -- November, 2011,
2 before the show.

3 THE COURT: It was December, 2011.

4 THE WITNESS: Yes.

5 THE COURT: I'm sorry.

6 THE WITNESS: Because Mr. McClimond or Car Wash Experts
7 became a distributor of our products. So he was in our
8 database.

9 THE COURT: No. No. No.

10 You were distributing this innovative product in May of
11 2011.

12 THE WITNESS: Yes.

13 THE COURT: Right?

14 THE WITNESS: Yes.

15 THE COURT: And selling it. Right?

16 THE WITNESS: Yes.

17 THE COURT: Under your name, New Wave. Right?

18 THE WITNESS: New Wave Innovations, Inc.

19 THE COURT: Okay. In December, you sent out a
20 Christmas and you call it -- I guess that cartoon there was
21 your product. Right?

22 THE WITNESS: The character was Mr. Foamer, which was
23 our product.

24 THE COURT: What you're holding in your hand. Right?

25 MR. FARO: Exhibit No. 10.

EXHIBIT "8"

CERTIFICATE OF SERVICE

New Wave Innovations, Inc.

502 N. School Street.
Lodi, CA 95240

Invoice

| Date | Invoice # |
|------------|-----------|
| 11/12/2011 | 136 |

| |
|--|
| Bill To |
| CAR WASH EXPERTS INC JIM MCCLIMOND 6436 REVELLE CIR. S. JUPITER, FL 33458 |

| |
|--|
| Ship To |
| CAR WASH EXPERTS INC JIM MCCLIMOND 6436 REVELLE CIR. S. JUPITER, FL 33458 |

| P.O. Number | Terms | Rep | Ship | Via | F.O.B. | Project |
|------------------------------|-------------------|---|--------------|--------|------------|---------|
| | | | 12/7/2011 | UPS | | |
| Quantity | Item Code | Description | Price Each | Amount | | |
| 1 | TCS-3MK | TRIPLE COAT SET- TWO ELEPHANT EARS AND ONE TOP EAR W/ GENERATORS AND MOUNTS | 487.95 | 487.95 | | |
| | 1258 | 1/2 FIT, 3/8 FIT | | | | |
| | 44SQ | 4X4 IN SQUARE FRAME | 0.00 | 0.00 | | |
| 1 | TSG-1MK | TOP SHIRK W/ GENERATOR W/ MOUNTING KIT | 0.00 | 0.00 | | |
| | 1258 | 1/2 FIT, 3/8 FIT | 209.95 | 209.95 | | |
| | 44SQ | 4X4 IN SQUARE FRAME | 0.00 | 0.00 | | |
| 1 | TFS-2MK | FOAM STICK SET W/ GENERATOR W/ MOUNTING KIT | 0.00 | 0.00 | | |
| | 1258 | 1/2 FIT, 3/8 FIT | 349.95 | 349.95 | | |
| | 44SQ | 4X4 IN SQUARE FRAME | 0.00 | 0.00 | | |
| | SHIPPING ESTIM... | Out-of-state sale, exempt from sales tax | 0.00 | 0.00 | | |
| Thank you for your business. | | | | | | |
| | | | Total | | \$1,126.85 | |

I hereby certify that the enclosed pleading entitled:

Motion for Judgment On The Record

was served upon Counsel for the Applicant on this 11th day of December, 2015, by email, with conformed copy by First Class.

Respectfully,

/John H. Faro/
John H. Faro, Esq.
Florida Bar No. 527,459
Attorney For Plaintiff

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